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Supreme Court of the United States

October Term, 1956

No. 903

INDIAN TOWING COMPANY, Inc.,
Petitioner

versus

THURSTON CRAWFORD et al.,
Respondents

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Proctor for Petitioner.

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Lansing L. Mitchell,
Of Counsel

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Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINIONS BELOW

The opinion of the District Court, and the reversing opinion of the Court of Appeals, are reported, respectively, at 139 FS 547 and 237 F2d 916, and are printed in the appendix hereto.

JURISDICTION

The judgment sought to be reviewed was rendered on January 18, 1957. Rehearing was denied on March 11, 1957. Jurisdiction of this court lies under 28 USC 1254.

QUESTION PRESENTED

The important question of maritime law presented in this case is whether the rule, established in opinions of this court, that when a ship in collision is in violation of a statutory rule designed to prevent collisions she must be cast in damages absent proof that the violation could not have been a contributing cause, can be vitiated by reference to theories of "condition" as opposed to "cause", or to the "doctrine of last clear chance".

The abruptness of this departure from the rule laid down by this court is emphasized in the statement by the Court of Appeals that its decision was reached "under the rules of common sense"—"entirely aside from any rules of admiralty law".[1]

The various circuits, and, in some instances, even different panels of the same court, have reached conflicting conclusions as to whether this court's rule should be applied as stated, or whether it may be emasculated by exceptions.

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[1] See page 12 below.

STATUTES INVOLVED

The case involves violations of the following statutory Inland Navigation Rules:

Article 18, Rule I: "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. . . ." (33 USC 203, 30 Stat. 100).

Article 18, Rule III: "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (33 USC 203, 30 Stat. 100).

Article 23: "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or reverse." (33 USC 208, 20 Stat. 101).

Article 25: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." (33 USC 210, 30 Stat. 101).

STATEMENT OF THE CASE

The collision at issue occurred in Lake Borgne (Louisiana), in a buoy-marked, 150-foot dredged channel, running roughly east-west, which forms part of the Gulf Intracoastal Waterway.

On the morning of June 29, 1953, petitioner's Motor Vessel *Cherokee* was traveling westward in this channel, on the north (her starboard) side. She was fully manned and was seaworthy in all respects.[2] The weather was good; visibility was clear; and there was little or no wind.

Respondent's Motor Vessel *Suwannee* was proceeding eastward in the channel, on the south (her starboad) side, pushing the loaded barge *Coastal No. 7*. She was holding the head of her tow up to the northeast, diagonally across the entire channel, to counteract the effect of a current running against her. (The *Suwannee* and her tow continued at full speed in this position flanked across the channel until the collision occurred.)

The approaching vessels were in full view of each other. The *Cherokee* was proceeding at about six miles per hour over the ground, the *Suwannee* at eight. When they had closed to about 400 yards, the *Cherokee* sounded a one-blast signal for the prescribed port-to-port passing. There was no reply.

The *Cherokee* continued along the extreme northern edge of the channel to give the *Suwannee* as much room

[2] R 17.

as possible. She realized that the *Suwannee* was holding the head of her tow up to the northeast, presumably to overcome the effect of the current;[3] but anticipated that, as the vessels closed, the *Suwannee* would execute the easy maneuver of allowing the head of her tow to fall off with the current to the south to let the *Cherokee* pass. The *Cherokee* fully expected that the vessels would make the usual port-to-port passage.[4]

The *Suwannee* nevertheless continued to flank across the channel, with the head of her tow reaching the northern edge. When the vessels had closed to 400 feet, the *Cherokee*, sensing that the *Suwannee's* failure to alter course was creating a dangerous situation, sounded the danger signal, put her rudder hard right and reversed at full speed. The *Suwannee* continued on her collision course and rammed the *Cherokee* amidships on her port side, crushing the *Cherokee's* hull.

The collision occurred in the extreme northern edge of the dredged channel. The *Suwannee* gave no signals at any time, made no effort to change her course, and never reduced speed prior to the collision.

The *Suwannee's* failure to keep to her starboard side of mid-channel was a violation of Article 25 of the Inland Navigation Rules (33 USC 210). Her failure to reduce speed in an effort to avoid collision was a violation of Article 23 of the Rules (33 USC 208). Her failure to an-

[3] R 39.

[4] A vessel is entitled to assume that other vessels will obey the rules of the road. *The Victory and The Plymothian*, 168 US 410 (1897).

swer the *Cherokee's* passing signal, or to give the four-blast danger signal as a warning that she was not going to depart from her collision course, were violations, respectively, of Rules I and III of Article 18 (33 USC 203).

On these facts, the District Court held the *Suwannee* solely to blame for the collision.

Accepting the facts as found by the District Court, the Court of Appeals reversed, and held the *Cherokee* solely liable on the stated ground that, without regard to the *Suwannee's* statutory faults, the *Cherokee* had had the "last clear chance" to avoid the collision by leaving the prescribed navigation channel, the *Suwannee's* negligence being "not the proximate cause" but "merely a condition" of the injury.

ARGUMENT

In a series of cases beginning with *The Pennsylvania,*[5] this court has established, and consistently adhered to, the rule that "when . . . a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."[6]

[5] 86 US 125 (1873).

[6] *Id.*, at p. 136 (1873). See also *Richelieu Nav. Co. vs Boston Ins. Co.*, 136 US 408 (1890); *Belden vs Chase*, 150 US 674 (1893); *The Martello*, 153 US 64 (1894); *Lie vs San Francisco & Portland S. S. Co.*, 243 US 291 (1917).

There is not the slightest suggestion that the *Suwannee's* statutory breaches did not contribute, much less that they could not have contributed, to the instant collision. The District Court which heard the witnesses found, in fact, that the *Suwannee's* fault was the sole cause of the casualty.

Under these circumstances, to absolve the *Suwannee* of all responsibility by reference to theories of "cause" and "condition" and of "last clear chance", is clearly, if subtly, to depart from the rule established in this court.

This is not the first example of such a departure,[7] although adherence to the rule has been faithful in many instances despite understandable temptation to ignore it in cases of disproportion in fault.[8]

Reference to the two preceding footnotes shows that the various circuits, and even panels of the same court, have reached conflicting conclusions as to whether the rule should be applied categorically, or whether it may be emasculated by exceptions.

Whatever present considerations may favor or disfavor continued adherence to the rule, it is respectfully sub-

[7] See *P. Dougherty Co. vs United States*, 207 F2d 626 (CA 3-1953); *The Sanday*, 122 F2d 325 (CA 2-1941); *The Cornelius Vanderbilt*, 120 F2d 766 (CA 2-1941).

[8] *Yang-Tsze Ins. Assn. vs Furness, Withy & Co.*, 215 Fed. 859 (CA 2-1914), cert. dis., 242 US 430; *The H. F. Dimock*, 77 Fed. 226 (CA 1-1896). See also *Carr vs Hermosa Amusement Corporation*, 137 F2d 983 (CA 9-1943), cert. den., 321 US 764; *General Seafoods Corporation vs J. S. Packard Dredging Co.*, 120 F2d 117 (CA 1-1941); *The Piankatank*, 87 F2d 806 (CA 4-1937); *Puget Sound Nav. Co. vs Nelson*, 59 F2d 697 (CA 9-1932).

mitted that the existing uncertainty as to its status—as epitomized by the instant disregard thereof by the Court of Appeals—calls for definitive resolution by this court.

Eberhard P. Deutsch,
Proctor for Petitioner.

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Lansing L. Mitchell,
Of Counsel

April, 1957.

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OPINION OF THE COURT OF APPEALS

This appeal in admiralty from the interlocutory decree of the district court complains of the holding that appellants, as charterers and owners of the tug Suwannee, are solely responsible for collision damages to appellee's motor vessel Cherokee.

For the purpose of the appeal, appellants concede, as they must, the correctness of testimony adduced by appellee since the trial court accepted it as correct.

The facts as disclosed principally by first mate Mock, who was navigating the Cherokee, together with the charts and diagrams, about which there is no dispute, were briefly as follows:

Just before sunrise on June 29, 1953, in adequate daylight in clear weather, the two craft here involved were approaching each other in the Louisiana portion of the intracoastal waterway, a waterway with a dredged channel of 125 to 150-foot width. The Suwannee, an 85-foot tug, was pushing a 240 foot loaded oil barge eastward, The Cherokee, a converted minesweeper 125 feet in length, was headed westward unencumbered. Both vessels drew in the neighborhood of 9 feet of water. Both were adequately manned and neither was unseaworthy in any respect here material.

As the Suwannee was first seen by Mock she was coming under the influence of the tides running out of the Rigolets, a deepwater tidal channel connecting Lake

Pontchartrain and Lake Borgne. He was then one-half mile distant from the Suwannee which, as he surmised, in an effort to counteract the tendency of the current to drive the barge to the south of the channel, was flanking down the channel, that is to say, instead of moving in a straight course in relation to the axis of the channel, it was headed diagonally across the entire channel.[1] No passing signals were given by either craft until, when they were 400 yards apart, Mock gave a single blast, signalling a port to port passage. No reply was received. At that time Mock was holding the Cherokee's course at the extreme northern side (the right hand side for her) of the channel as marked by buoys. He continued at a speed of six miles an hour, although the Suwannee headed even more in a northerly direction, until, when 400 feet away, Mock blew a danger signal and then reversed his engines and turned sharply to the right. This placed Cherokee across the right bow of the barge, which crushed the hull of the Cherokee, which was then beached to prevent sinking. This collision took place 200 feet east of nun buoy 48 which, according to the chart, marks the east end of the dredged channel, so that for approximately the next mile there is deep tidal water before the dredged channel commences again. During the entire distance from the Cherokee's first sighting of the Suwannee there was open water 15 to 19 feet in depth, both north and south of the marked channel. Mock testified that his craft had left the Rigolets Range (a line down the middle of the waterway) and was proceeding along the northern limits as marked by the buoys. He said the Cherokee

[1] Mock testified that he understood this procedure was necessary and that he would have followed the same course.

could "turn" in her own length of 125 feet. Mock testified that he had traversed these waters before and had navigated the Rigolets; he also stated that he had run aground on a spoil bank on the northeast bank of the Rigolets; that he was navigating by the ranges rather than by chart and that he expected the Suwannee to let the head of her tow "fall off" to the right or south in order to make the port to port passage. When asked on cross-examination why, when he saw the Suwannee angling to the north, as she proceeded eastward, he didn't run up the Rigolets to get out of the way of the other vessel, Mock said: "Because I ain't got no habit of running from people in the channel."[2]

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[2] Pertinent parts of this testimony follow:
"Q. Now, Captain, when you saw him holding up into the channel, why couldn't you have run up the Rigolets and gotten out of his way? You were a light boat?
A. Right.
Q. Why couldn't you do that?
A. Because I ain't got no habit of running from people in the channel.
Q. But you could have done it?
A. No.
Q. Why couldn't you?
A. Could have left the channel and gone way out of the channel, when, by Heck, that was our course, taking it here (indicating chart) to get to New Orleans.
Q. But, Captain, to avoid a collision, couldn't you have run into the Rigolets?
A. How did I know he was going to run over me.
Q. You saw him, you testified, blocking the channel.
A. He was coming down side—the south side—coming this way. He didn't have the whole channel blocked.
Q. Angling to your side?
A. Yes.
Q. But you didn't run out of the channel into the Rigolets, which you could have done?
A. I did do it, steered out the channel.
Q. Couldn't you have run further to the north to the Rigolets?
A. I suppose when I saw him coming I could have turned and run way off here and probably went aground.

The court, accepting completely the testimony of appellee's witnesses, as we have done here, found the Suwannee at fault; that any fault which does rest with the Cherokee was "minor, indeed venial compared with the grevious fault of the Suwannee," and entered a decree for the libelant.

Appellants here complain that the accepted version of the collision demands a reversal because they say that any fault of the Suwannee was a condition and not the cause of the collision or that such fault was minor as compared to that of Cherokee, and therefore to be excused under the "Major-Minor Fault Rule;" that the Cherokee had the last clear chance to avoid the collision; and that the collision resulted from the sole fault of the Cherokee.

Entirely aside from any rules of admiralty law, it must be apparent that under the rules of common sense this is an accident that should not have happened. Here is an end-on collision which took place because one tug encumbered by pushing a 240-foot barge diagonally down a 150-foot dredged waterway at six to seven miles an hour,

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Q. Well, Captain, look (indicating chart)—there is plenty of water up here for you to run, isn't there?
A. Yes.
Q. You wouldn't have gone aground in 27 or 21 or 18 feet, would you?
A. Well, I tell you—
Q. Answer that question, would you?
A. I am going to answer.
MR. MITCHELL:
I object to counsel arguing with the witness.
MR. MATTHEWS:
The witness is arguing with counsel, not counsel with the witness.
A. On the rules—there is the ranges—he knew the rules and regulations the same as anybody else is supposed to know them."

comes out into open water where it is struck by another tug fully aware of this situation, proceeding unencumbered in the opposite direction at a point where there is ample depth on both sides of the craft for a safe passage to be made. That such deep water is available up the Rigolets is not only apparent from the charts of the area but it is also indicated by a break in the line of buoys that mark the waterway where it follows the dredged channel. Electing, rather than to turn to the north outside of the prolongation of the dredged channel, (although perfectly safe to do so) to hold to its own course within the narrow confines of the marked waterway the light tug maintained its collision course in the expectation that the flotilla consisting of a 75-foot tug and a 240-foot loaded barge, would "fall off" to the south to permit a port to port passage. There is no evidence to show how quickly or with what degree of safety the east bound tug could accomplish this maneuver. The current which would be expected to carry the bow of the barge off to the right or south was only a half mile per hour, according to Mock.

In light of Mock's testimony that he saw the Suwannee; appraised her maneuver for what it was and thought that it was a proper maneuver; and in light of the availability of ample deep water to his right for him to make the port to port passage for which he had signalled and in view of his maintaining his speed until after he sounded his danger signal, at which time the most he could hope for, according to his testimony, was a glancing blow when the craft came together, we are inevitably forced to the conclusion that the Cherokee was stubbornly held to a course

which her navigator thought he was entitled to until too late to prevent a collision. In doing this he ignored the most basic rule of all:

> "Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked in that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do in that direction, without becoming responsible for its consequences, in case it occurs." *THE AMERICA v. The Camden & Amboy Railroad Transportation Co.*, 92 U.S. 432.

Obviously it would be improper for a tug to push a barge through a narrowly confned canal in such manner as would preempt the entire waterway. Even if it did so, however, under the need to prevent its running aground this would be no excuse for another vessel approaching it in full clear daylight to proceed without reducing speed into an end-on collision merely because of its right to passage. Much less is this so in an open waterway as here. By the time the Suwannee met the Cherokee its tow had passed out of the dredged part of the waterway and was in open water which bespoke for it the assumption that the port to port passage signalled by the Cherokee would be completed by the latter craft's going north of the line of the waterway to effect it. But if such an assumption was not proper for the Suwannee to make, it nevertheless was in its awkward and improper position not through whim or caprice, but because of a necessary maneuver, whereas nothing but blind insistence on a

right of way can explain the placing of the Cherokee in its position of peril. The Cherokee clearly had the last clear chance to avoid the collision. The Cornelius Vanderbilt (2 Cir.), 120 F. 2d 766. The Sanday, (2 Cir.), 122 F. 2d 325.

Whether this be called an application of the doctrine of last clear chance or the rule of causation, makes little difference. Where as here, an act is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. *P. Dougherty Co. v. United States* (3 Cir.), 207 F. 2d 626.

We find no basis in the record for the finding of the trial court that the water outside the channel at the place of the meeting was shoal or that "spoil banks proliferate in Lake Borgne" at that place. The chart shows, to the contrary that there was ample maneuvering room in deep water at the very place where the collision took place; moreover, the fault of the Cherokee in not reversing engines in time to avoid a collision when her navigator was in constant awareness of the relative position of the two craft was grave indeed. As stated in *Postal Steamship Corp. v. Steamship El Isleo*, 308 U.S. 375:

> "The plain purpose of the Inspectors' rules is to minimize the danger of collision. The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be 'stopped and backed if necessary, until

> signals for passing with safety are made and understood.' "

See also *George S. Tice, New York & Albany Lighterage Co. v. Davis, Dir. Gen. et al; Sargent Barge Line Inc. v. Davis, Dir. Gen.* (3 Cir.), 287 Fed. 127. The Cutler (D.C.N.Y.) 58 F.Supp. 864, affirmed p.c. 2 Cir., 147 F. 2d 545.

It seems clear that Mock, the navigator of the Cherokee, gave the real explanation as to why he did not take the simple action that would have prevented the destruction of his craft. He simply determined that he would not veer from the direct course to New Orleans by so much as the width of his vessel and he didn't propose to give up his right of way.

The damage to the Cherokee is attributable entirely to this gross fault on the part of her navigator. The trial court erred in giving a decree for the libelant. The judgment is REVERSED and REMANDED with the directions that a decree be entered for respondent, the appellant here.

OPINION OF THE DISTRICT COURT

This libel in admiralty is based on a collision between the M/V Cherokee, a converted United States Navy YMS, and a barge in tow of the M/V Suwannee, after daylight on the morning of June 29, 1953, in the Gulf Intracoastal Waterway, just east of Catfish Point, in Lake Borgne, Louisiana. The Cherokee alone sustained damage for which her owner makes claim in this action.

The M/V Cherokee was a wooden vessel, approximately 125′ in length, beam of 25′, depth of 11.6′ and a draft of 8 to 9′. Her twin screws were propelled by two 625 HP General Motors diesel engines which were pilothouse controlled. On the voyage in question she was manned by a crew of six and was in all respects seaworthy.[1] The M/V Suwannee was an Army-type single screw tug, 85′ in length, with a steel hull, powered by a 660 HP Superior diesel engine which was engine room controlled by bell and whistle signals from the pilothouse. Her crew consisted of six men. The Barge Coastal No. 7, measuring 240′ in length by 50′ in beam with a draft at the time of 8′, was fully loaded with petroleum products. On the morning in question, it was made up to the Suwannee forward of her bow with cables and ratches, forming a rigid unit or integrated tow.

When the vessels first came in sight of each other, the Cherokee was proceeding west, the Suwannee east, in a straight reach of the waterway. The Cherokee was on the north side of the dredged channel through

[1] One of the Cherokee's engines was inoperative, but this condition did not detract from her seaworthiness.

Lake Borgne, navigating at a speed of approximately six miles per hour over the ground. The Suwannee, proceeding at eight miles per hour, was flanking across the channel, a short distance east of Catfish Point in the area where the Rigolets[2] sweeps into Lake Borgne, diagonally across the dredged channel from northwest to southeast. At the time a heavy tide was running out of the Rigolets and the Suwannee was holding the head of her tow up to the northeast in an effort to counteract the effect of the tide, and thereby stay in the channel. The 150′ dredged channel, which runs generally east and west, is marked on either edge by a line of buoys and an appropriately placed range on Catfish Point marks the center of the channel. The weather was clear, visibility was good and there was little or no wind.

When the Cherokee was approximately 400 yards from the Suwannee's tow, she sounded a one-blast signal for port-to-port passing.[3] There was no reply. The Cherokee continued on, angling toward the extreme north edge of the channel in order to give the Suwannee as much of the dredged cut as possible. The Cherokee realized that the Suwannee had to hold the head of her tow up to the northeast in order to overcome the effect of the Rigolets current, but anticipated that as the vessels closed, the Suwannee would allow the head of her tow to fall off to the south to make passage room in the channel for the Cherokee.

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[2] The Rigolets is a deep water natural channel connecting Lake Pontchartrain with Lake Borgne.

[3] See Inland Rules, Article 25, 33 U.S.C. §210, and Article 18, 33 U.S.C. §203.

The Suwannee, however, continued to flank across the channel until the head of her tow reached the northern edge. When the vessels were within 400 feet of each other, the Cherokee sounded the danger signal, put her rudder hard right and thereafter reversed her engine at full speed. This maneuver, however, merely opened the port side of the Cherokee to collision with the tow of the Suwannee. The Suwannee and her tow, sounding no signals at any time, continued to bear down on the Cherokee, and the port bow of the Barge Coastal No. 7 struck the Cherokee amidship on the port side, crushing her hull. The collision occurred on the extreme north edge of the dredged cut. The Cherokee immediately began to make water and was subsequently beached on a spoil bank to the north of the channel.

As is customary in cases of this kind, the testimony of the witnesses from each vessel is irreconcilable. The Cherokee's witnesses testified to the facts which this court has found. The witnesses of the Suwannee placed the Cherokee outside the channel to the south when first sighted, suggesting that the Cherokee was navigating the wrong range, and that on approaching shoal water, the Cherokee turned abruptly to starboard and crossed the bow of the Suwannee's tow in the south side of the channel.

This discrepancy in the testimony of the crews of the two vessels was resolved by the testimony from the pilot of the M/V Frank B. Durant, which was navigating in the same direction one-half mile ahead of the Cherokee on the morning in question and which had passed the

Suwannee and her tow just after the Suwannee emerged from the land cut at Catfish Point a few minutes before the collision. This witness testified that after the Frank B. Durant passed the Suwannee, the Suwannee and her tow came under the influence of the Rigolets current and that in order to overcome the effect of that current, the Suwannee put the head of her tow up to the north and began flanking across the channel. This witness testified that the Cherokee at the time was proceeding on the north side of the channel a half mile astern of the Durant and that he realized when the Suwannee began her maneuver athwart the channel, the Cherokee was in danger. The testimony of this witness proves that the witnesses from the Suwannee are unworthy of belief and that the testimony of the Cherokee's witnesses should be credited.

Libellant contends that the collision was caused by the failure of the Suwannee to allow the Cherokee passage room in the channel. It argues further that should the Suwannee's version of the accident be accepted, the Suwannee was nevertheless at fault, being the burdened vessel in a crossing situation and having failed to give way to the favored vessel.[4] The Suwannee, frustrated by the witness from the Frank B. Durant in her attempt to make a special circumstance[5] out of a meeting situation,[6] argues that, accepting the testimony of the Cherokee, the position of the Suwannee athwart the channel was obvious, that it was a condition rather than a cause of

[4] See Inland Rules, Article 19, 33 U.S.C. §204.
[5] See Inland Rules, Article 27, 33 U.S.C. §292.
[6] See Inland Rules, Article 18, 33 U.S.C. §203.

the collision,[7] and that the Cherokee should have run past the buoys outside the channel to avoid the collision.

The collision was caused by the pre-emption of the entire width of the channel by the Suwannee and her tow, and by the failure of the Suwannee timely to allow the head of her tow to fall off to the south to make passage room in the channel for the Cherokee. It is true that the Cherokee was unencumbered while the Suwannee was not only towing but was also fighting the Rigolets current, the effect of which would tend to press her to the south, outside the channel and into shoal water. It is understandable, therefore, that once she came under the influence of that current after meeting the Frank B. Durant, she would hold the head of her tow up to the north and flank across the channel. The Cherokee understood the predicament in which the encumbered Suwannee found herself, but the Cherokee had a right to assume that when the vessels came within reach of each other, the Suwannee would allow the head of her tow to fall off to the south to make passage room in the channel for the Cherokee. There was no reason for the Cherokee to assume that the Suwannee expected her to run outside the channel into shoal water where spoil banks proliferate in Lake Borgne.

The Suwannee, pointing to the chart of the area, shows that there was water sufficient for the Cherokee outside the channel at the point of collision, and that the Cherokee should have sought this deep water outside the channel

[7] Citing *P. Dougherty Co. v. United States*, 3 Cir., 207 F.2d 626; *The Sanday*, 2 Cir., 122 F.2d 325; *The Cornelius Vanderbilt*, 2 Cir., 120 F.2d 766; *The Perseverance*, 2 Cir., 63 F.2d 788.

in order to avoid the collision. But the Cherokee was navigating without a chart. She was navigating on the range and by the channel markers. Moreover, when the emergency arose, her attention was riveted on the maneuvers of the Suwannee, making it impossible for her navigator to consult a chart. The navigator of the Cherokee had been aground in that very area a short time before the incident in suit. Under the circumstances, his reluctance to leave the channel was understandable. In the emergency, he was faced with the alternative of leaving the channel in an attempt to run around the Suwannee and her tow, or, as is instinctive with navigators, and as the courts have required,[8] of reversing his engines. He reversed his engines and was hit broadside. The Suwannee would condemn him therefor. If he had not reversed his engines and proceeded at the same speed under hard right rudder in an unsuccessful effort to avoid the Suwannee's tow, no doubt the Suwannee would then condemn him for not reversing his engines.

It is true that the Cherokee waited too long before taking emergency action to avoid the collision. But her failure in this regard should not condemn her to divide the damages. She had a right to assume, and she kept hoping, that the head of the Suwannee's tow would fall off to the south.[9] She waited and hoped too long. But the fault of the Suwannee is so obvious, it completely accounts for the collision, that it is not necessary myopically to weigh the action of the Cherokee in the emer-

[8] *The New York*, 175 U.S. 187, and cases collected on p. 201.
[9] *The Delaware*, 161 U.S. 459, 469; *Compania de Maderas, etc. v. The Queenston Heights*, 5 Cir., 220 F.2d 120, 123.

gency created by the Suwannee.[10] Any fault which does rest with the Cherokee was minor, indeed venial, compared with the grievous fault of the Suwannee,[11] which expected the Cherokee to navigate outside the channel among the spoil banks of Lake Borgne. When the Cherokee failed to come up to the Suwannee's expectation, the collision resulted. Then the Suwannee, by the testimony of her crew, sought to alter the facts of the case to cover her grievous fault.

This case is similar in some of its aspects to *Compania de Maderas, etc. v. The Queenston Heights, supra.* There the Star of Honduras waited too long before sounding her danger signal and reversing her engines before the oncoming Queenston Heights, which was being navigated diagonally across the Mississippi River into the path of the Star. The court held that it would not apply the rule of *The Pennsylvania*[12] literally, that where the gross fault of one vessel sufficiently accounts for the collision the court should not critically examine the navigation of the other in the emergency in an effort to divide the damage. Here the Cherokee, after attentively and carefully weighing the predicament of the Suwannee, made available to her the entire width of the channel, assuming that she, the Cherokee, would be allowed passage room when the vessels came within reach of each other. Perhaps, in spite of the fact that the Suwannee sounded

[10] *The Victory & The Plymothian,* 168 U.S. 410, 423; *The City of New York,* 147 U.S. 72, 85; *Compania de Maderas, etc. v. The Queenston Heights, supra; Steffens v. United States,* 2 Cir., 32 F.2d 206.

[11] See *The Great Republic,* 90 U.S. 20; *Compania de Maderas, etc. v. The Queenston Heights, supra; The Lord O'Neill,* 4 Cir., 66 Fed. 77.

[12] *The Pennsylvania,* 86 U.S. 125, 136.

no signals whatever, the Cherokee should have realized sooner that the Suwannee had no intention of affording her passage room and started evasive action earlier. But this fault, if any, is minor as compared to the Suwannee's and comes within the major-minor fault rule of *The Great Republic, supra, Compania de Maderas, etc. v. The Queenston Heights, supra,* and *The Lord O'Neill, supra.*

Decree for libellant.

JUDGMENT OF THE COURT OF APPEALS

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with the directions that a decree be entered in accordance with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Indian Towing Company, Inc., as owners of the M/V CHEROKEE, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 903

INDIAN TOWING COMPANY, INC.,
Petitioner,

versus

THURSTON CRAWFORD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED

We emphatically disagree with petitioner's statement that there is here presented an "important question of maritime law". The only question of law involved in this case was answered by this Court in *Postal Steamship Corporation vs. Steamship El Isleo*,[1] wherein Your Honors held that a so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action, and that her right to maintain her privilege ends when danger of collision is

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[1] 308 U.S. 378, 84 L. Ed. 335.

apparent. Obviously dissatisfied with this answer because it is fatal to petitioner's contention, petitioner seeks another examination of the question.

The Court of Appeals found petitioner's vessel so grossly at fault under the *El Isleo* rule, that, applying the "doctrine of last clear chance" or "the rule of causation", respondent's vessel was exonerated under well-established jurisprudence.[2] No other question of law is presented—only questions of fact which, under prior jurisprudence, this Court will not re-examine on certiorari.

Additionally, it is here contended, petitioner is seeking a review based on a non-existent factual situation.

STATUTES INVOLVED

Petitioner cites four statutes as involved in this matter. They are all statutory rules governing navigation. The fourth, Article 25, has no application whatsoever to this case because the collision here involved did not occur in a narrow channel, as we shall hereinafter point out.

There is no question of statutory construction presented at all, and whether or not there were inexcusable violations of the other navigation rules cited by petitioner presents factual questions of a character which Your Honors will not review on certiorari under your jurisprudence. That is of particular moment in this case, since

[2] The statement on page 2 of petitioner's brief that the Court of Appeals abruptly departed from the jurisprudence of this Court by reaching its decision "'under the rules of common sense'—'entirely aside from any rules of admiralty law'" is inaccurate and the quotation is lifted out of context. The Court of Appeals said—"Entirely aside from any rules of admiralty law, it must be apparent that under the rules of common sense this is an accident that should not have happened." Petitioner's brief, page 12. The Court went on to apply the *El Isleo* rule and condemn petitioner's vessel.

the review is sought in connection with what we contend is a non-existent factual situation.

THE CASE

Respondent submits that petitioner has incorrectly stated a basic fact of this case, and has failed to state other basic facts which must be understood before the merits of petitioner's legal argument can be evaluated.

At the outset of its presentation, petitioner states that the collision occurred "in a buoyed-marked, 150 foot dredged channel". This is not accurate. For the Court's convenience, we append to this brief a copy of the United States Coast and Geodetic Survey Chart No. 878, showing the scene of the collision, which took place just to the east of Nun Buoy 48. From this chart it will be noted that the Intracoastal Waterway enters Lake Borgne from the west in the vicinity of Cat Fish Point and then runs generally in a southeasterly direction a distance of approximately two and a quarter statute miles, where it bends to the north and then runs generally in an east-west direction. The dredged or shallow portions of the channel are marked by buoys. From Cat Fish Point easterly to Nun Buoy 48 the channel is dredged with a spoil bank on the south side, but east of Nun Buoy 48 the channel crosses the Rigolets and there is deep water on either side from Nun Buoy 48 to the bend of the channel at Nun Buoy 42 a distance of approximately 1 and 3/20 statute miles.[3]

The collision occurred "200 feet east of nun buoy

[3] " * * * there is ample depth on both sides of the craft for a safe passage to be made. That such deep water is available up the Rigolets is not only apparent from the charts of the area but it is also indicated by a break in the line of buoys that mark the waterway where it follows the dredged channel." Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 13.

48 which, according to the chart, marks the east end of the dredged channel, so that for approximately the next mile there is deep tidal water before the dredged channel commences again".[4]

Petitioner's vessel, the CHEROKEE, on the day of the collision had no tow and was drawing from eight to nine feet. After rounding Nun Buoy 42, she proceeded west in the channel, running on the Rigolets Range. At the same time the Tug SUWANNEE, pushing the Barge COASTAL NO. 7, a 240 foot tank barge loaded with a maximum cargo of petroleum products, was eastbound and had entered Lake Borgne from the west.

As found by the Court of Appeals,[5] Mock, the navigator of the CHEROKEE, then proceeding westerly, light and unencumbered by any tow, first saw the SUWANNEE and her tow proceeding easterly when they were under the influence of the strong tide running southerly out of The Rigolets. The SUWANNEE was then more than a half mile west of the CHEROKEE, which was running in the deep, open and unbuoyed stretch of water between nun buoys 42 and 48. Mock saw that the SUWANNEE, because it was encumbered with its tow, was flanking, i.e., holding the head of its barge up to the northward against the strong tide of The Rigolets. Mock testified he knew this to be necessary and that he would have followed the same course.[6] The CHEROKEE, when only 400 yards separated the vessels, blew the SUWANNEE a one-blast signal for a port to port pas-

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[4] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 10.

[5] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 9.

[6] Opinion of the Court of Appeals, 237 F. 2d 916, Note 1; Petition for Certiorari, p. 10.

sage, but did not then direct its course to its starboard, as it should have done to effect a port to port passage with the SUWANEE and its tow.[7] It continued full speed ahead, blew an unavailing danger signal at 400 feet and, as was to be expected, came into collision with the SUWANNEE's tow.

The CHEROKEE's disregard of "the rules of common sense" was explained by her navigator—"When asked on cross-examination why, when he saw the SUWANNEE angling to the north, as she proceeded eastward, he didn't run up the Rigolets to get out of the way of the other vessel, Mock said: 'Because I ain't got no habit of running from people in the channel.'"[8]

ARGUMENT

To what channel did Mock have reference? Neither the CHEROKEE nor the SUWANNEE and its tow was in any channel, and Mock belied this argument by admitting to a blind reliance on privilege. Because of this flagrantly negligent conduct of Mock, amounting to a willful refusal to yield an inch of his imagined, but nonexistent privilege in order to avoid a collision, the Court of Appeals held the CHEROKEE solely at fault, citing *The Cornelius Vanderbilt* (2 Cir.), 120 F. 2d 766, and *The Sanday* (2 Cir.), 122 F. 2d 325.[9] As stated by the Court of Appeals,[10] "Whether this be called an applica-

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[7] "By the time the SUWANNEE met the CHEROKEE its tow had passed out of the dredged part of the waterway and was in open water which bespoke for it the assumption that the port to port passage signalled by the CHEROKEE would be completed by the latter craft's going north of the line of the waterway to effect it." Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 14.

[8] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 11.

[9] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 15.

[10] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 15.

tion of the doctrine of last clear chance or the rule of causation, makes little difference. Where as here, an act [the conduct of the SUWANNEE] is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. *P. Dougherty Co. v. United States* (3 Cir.), 207 F. 2d 626." Your Honors refused a writ of certiorari in the *Dougherty-United States* Case.[11]

Petitioner has had its day in Court and is now merely seeking another review of factual matters that were fully considered by the two Lower Courts. If there is any legal proposition involved here, it is one which has been heretofore, and as recently as 1940, fully considered and stated by this Court.

In *Postal Steamship Corporation vs. Steamship El Isleo, supra*, the Court said:

> "The plain purpose of the Inspectors' rules is to minimize the danger of collision. The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be 'stopped and backed if necessary, until signals for passing with safety are made and understood'."

The decision of this case, therefore, involves nothing more than an application of the doctrine of the *El Isleo* to the action of the navigator of the CHEROKEE in refusing "to run from people in the channel". The rule was correctly applied by the Court of Appeals for the

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[11] 347 U.S. 912, 74 S. Ct. 476.

Fifth Circuit.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SELIM B. LEMLE,
Proctor for Respondents,
1836 National Bank of
Commerce Building,
New Orleans 12, Louisiana.

Of Counsel:
LEMLE & KELLEHER
GEORGE B. MATTHEWS

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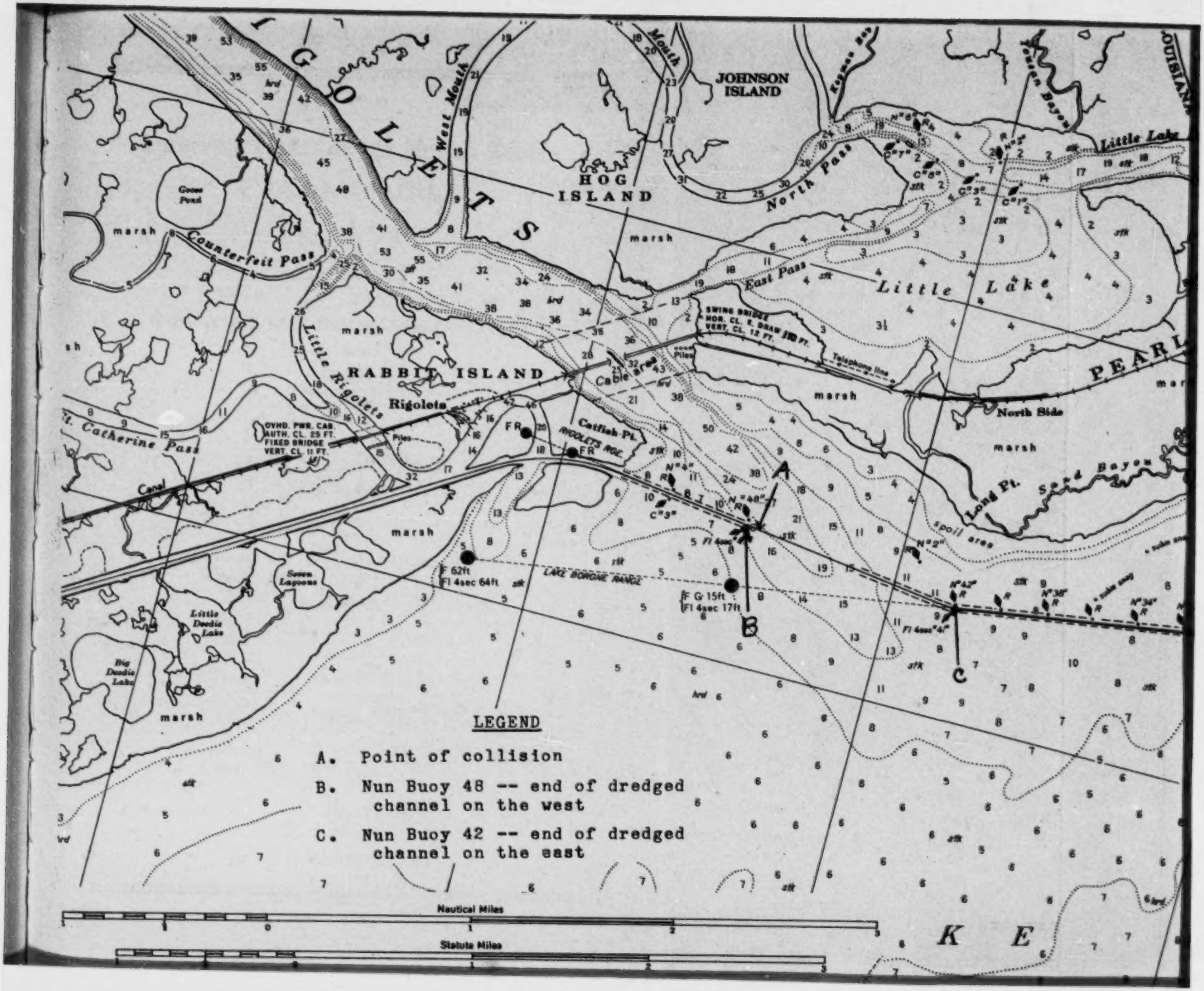
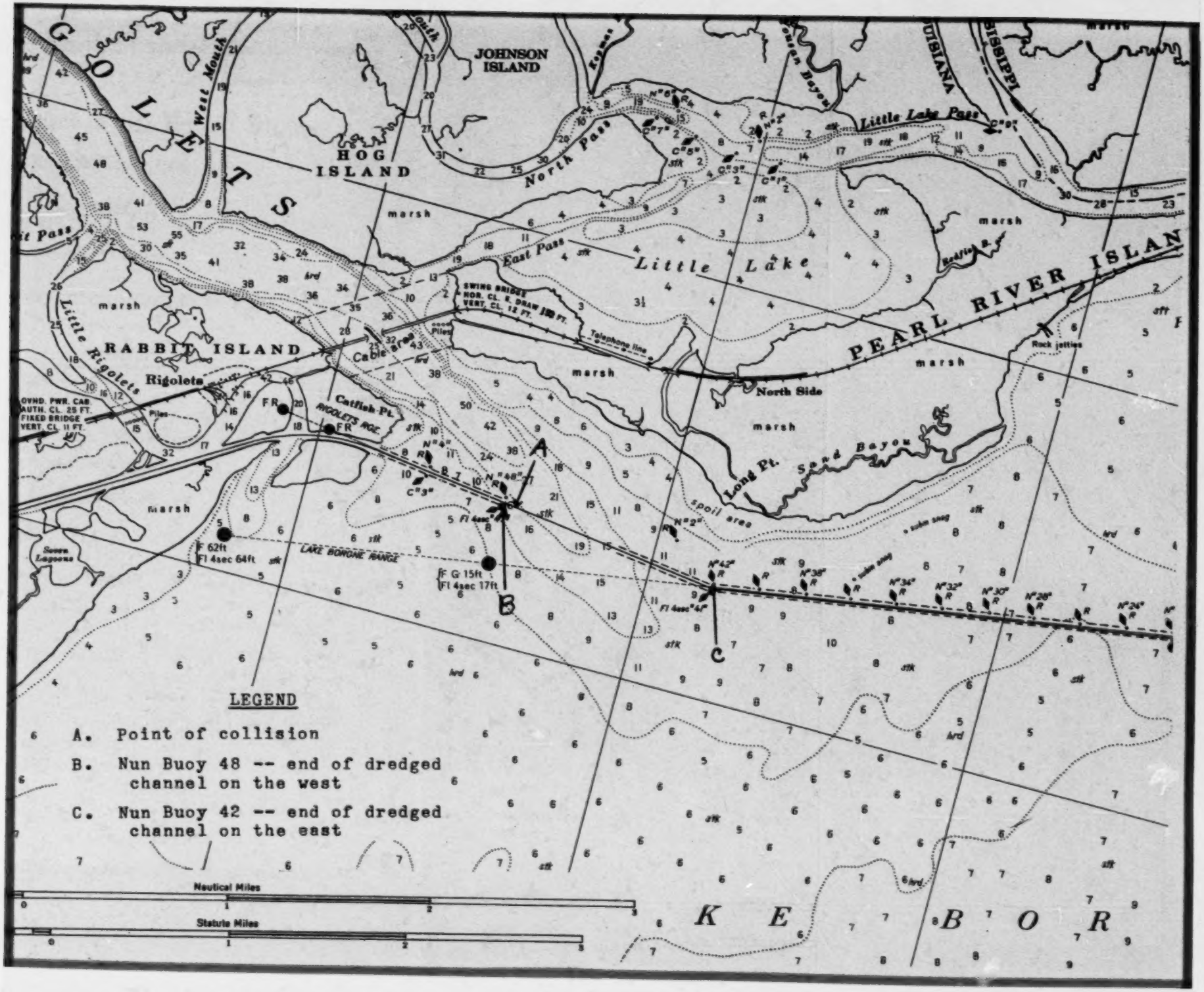
[12] While the Court of Appeals disposed of this case under the doctrine of "last clear chance" or the "rule of causation", it might with equal propriety have disposed of it and held the CHEROKEE, which was light and unencumbered by any tow, solely at fault for not navigating in a manner so as not to embarrass the SUWANNEE, which was encumbered with a large and heavy tow; *The Mayumba*, D.C., 21 F. 476; *The Rose Culkin*, D.C., 52 F. 328; *The Lucy*, 4 Cir., 74 F. 572; *The Georgetown*, D.C., 135 F. 854; *The Westhall*, D.C., 153 F. 1010; *The Maine*, D.C., 2 F. 2d 605; *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 26 Cal. 2d 365, 159 P. 2d 1.


RIGOLETS
West Mouth
Mouth
JOHNSON ISLAND
HOG ISLAND
North Pass
Little Lake
Goose Pond
Counterfeit Pass
East Pass
Little Lake
SWING BRIDGE
HOR. CL. 8. DRAW 150 FT.
VERT. CL. 12 FT.
Telephone line
Piles
Cable area
RABBIT ISLAND
Little Rigolets
Rigolets
PEARL
North Side
Long Pt.
Spoil Bayou
spoil area
OVHD. PWR. CAB.
AUTH. CL. 25 FT.
FIXED BRIDGE
VERT. CL. 11 FT.
Piles
Catfish Pt.
RIGOLETS RGE.
FR
Canal
Seven Lagoons
Little Deedie Lake
Big Deedie Lake
F 62ft
Fl 4sec 64ft
LAKE BORGNE RANGE
F G 15ft
Fl 4sec 17ft
A
B
C
marsh
LEGEND
A. Point of collision
B. Nun Buoy 48 -- end of dredged channel on the west
C. Nun Buoy 42 -- end of dredged channel on the east
Nautical Miles
Statute Miles
K E


JOHNSON ISLAND
HOG ISLAND
RABBIT ISLAND
Little Lake
PEARL RIVER ISLAN
North Pass
East Pass
Little Lake Pass
Little Rigolets
Rigolets
Catfish Pt.
RIGOLETS RGE.
SWING BRIDGE
Telephone line
Cable area
North Side
Long Pt.
Sand Bayou
spoil area
LAKE BORGNE RANGE
Seven Lagoons
Rock jetties
Piles
marsh
LEGEND
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K E B O R